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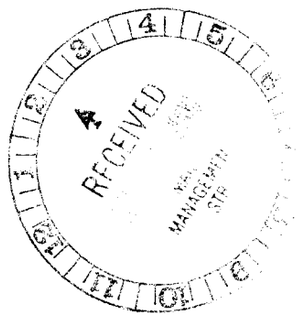
November 17, 2000



Mr. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423

Re: Ex Parte No. 582 (Sub-No. 1),
Major Rail Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing are a signed original and 25 copies of the Comments of National Grain and Feed Association in Response to Notice of Proposed Rulemaking in the above-captioned case. Also enclosed is a floppy disk in WordPerfect format containing the text of the same.

Sincerely,

Andrew P. Goldstein
Attorney for
National Grain and Feed Association

Enclosure

APG/rmm

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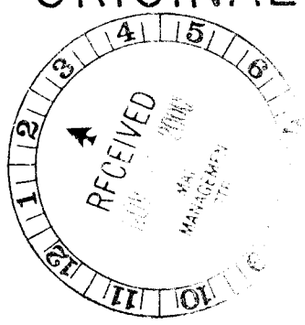

BEFORE THE

SURFACE TRANSPORTATION BOARD

EX PARTE NO. 582 (SUB-NO. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF NATIONAL GRAIN AND FEED ASSOCIATION IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

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Dated: November 17, 2000

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SURFACE TRANSPORTATION BOARD

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MAJOR RAIL CONSOLIDATION PROCEDURES

COMMENTS OF NATIONAL GRAIN AND FEED ASSOCIATION IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

I. INTRODUCTION

National Grain and Feed Association ("NGFA") is commenting in response to the Board's Notice of Proposed Rulemaking ("NPR"). NGFA is the U.S.-based trade association for over 1,000 grain, feed, processing and grain-related companies operating 5,000 facilities that store, handle, merchandise, mill, process and export more than two-thirds of all U.S. grains and oil seeds. About 70% of NGFA member firms are small businesses -- country elevators and feed mills. Also affiliated with NGFA are 36 state and regional grain and feed associations. NGFA filed comments in response to the Advance Notice of Proposed Rulemaking ("ANPR").

Those comments are summarized in Appendix N to the NPR.[1]

NGFA members rely heavily on rail service. Indeed, because of the nature of their business, NGFA members are among the most dependant on rail service of any category of shippers. For this reason, they very clearly recognize the need for healthy and strong railroads in the United States. NGFA believes, also, that railroads, like other businesses, need to operate efficiently. However, NGFA agrees with the Board that the rail industry has far less need now than it may have had in the past "to reduce excess capacity because that rationalization has largely been accomplished" through prior mergers.[2]

NGFA recognizes that the Board obviously is correct in noting that the criteria of the governing merger statute, 49 U.S.C. 11324, require the Board to balance various goals in determining whether a merger is in the public interest. See proposed § 1180.1(b). NGFA believes, however, that the Board must not only balance carefully, but must scrutinize with extreme care those factors that it does balance, given the Board's recognition that mergers are no longer necessary to eliminate redundant rail facilities.

It is in general the consensus of NGFA members that what has

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[1] As a broad-based trade organization, NGFA attempts to develop a consensus among its members. However, individual NGFA members may differ in whole or in part from the consensus views of NGFA or may find it propitious to emphasize certain issues which their individual companies deem to be of great significance, and may file separate comments.

[2] STB Press Release, October 3, 2000, accompanying NPR, at 1-2.

really been eliminated by rail mergers, and by the last few in particular, has been competition. If further mergers take place, the nation's rail system will be in danger of evolving not into a duopoly, but into a dual monopoly; two transcontinental systems that are at best highly selective regarding, and at worst downright opposed to, the flow of rail traffic between each other. The one trend that has emerged from recent mergers with absolute clarity is that the merged system resists and sometimes prohibits the movement of goods onto or away from its own lines, attempting to maximize the use of its assets above all other considerations, including the needs of its customers to retain access to points of production or consumption, as the case may be, in order to operate their business.

NGFA believes that future rail mergers must be scrutinized by the Board with extreme care to insure that efficiencies and other benefits claimed are realistically obtainable and not otherwise available through alternative strategies; and that if mergers are to be approved, they must be conditioned in certain respects to ameliorate injury to customers and to retain the ability of shippers to move goods throughout the entire national rail system without unreasonable impediments. If the Board's merger rules cannot promote achievement of these goals, NGFA may be compelled to actively participate in opposition to specific merger proposals.

II. COMMENTS REGARDING SPECIFIC RULE PROPOSALS, INCLUDING REQUESTS FOR FURTHER CONDITIONS

A. Competition.

Proposed § 1180.1(c) states that the Board will require "demonstrable gains in important public benefits -- such as improved service, enhanced competition, and greater economic efficiency" to outweigh the potential harm of mergers.

Enhanced competition is not defined in the rules because the Board believes that "[c]ompetition can be enhanced in many ways and we do not want to limit the approaches that could be proposed to enhance competition here." Id. Indeed, it is not even clear whether "enhanced competition" means enhanced competition between railroads (as NGFA thinks it should) or enhanced competition between railroads on the one hand, and trucks or water commerce, on the other.

Further, it is unclear whether "enhanced competition" and other Section 11324 considerations are to be measured under past merger standards or new standards of benefit and harm that the Board may develop. The ANPR sought comments on substantive merger standards, such as whether a reduction in rail service from three carriers to two should be regarded as anticompetitive. (NGFA commented, and continues to believe, that 3-to-2 reductions are anticompetitive and should be remediated.) Having solicited comments on substantive issues, the Board should address them.

Nevertheless, the NPR does state (proposed § 1180.1(c)(2)(i)): "Applicants shall also explain how they would at a

minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts for one segment of a movement as a means of gaining the right separately to pursue rate relief for the remainder of the movement." In its NPR Press Release, the Board describes these three elements as the minimum requirements for "enhanced competition."

NGFA believes that the Board's proposal contains too much uncertainty and that it is not sufficiently clear how the gateway, build-out, and bottleneck tines of the proposed rule would actually operate. Without greater clarity, these elements will fail to provide an effective benchmark for negotiations between shippers and railroads and for use if and when shippers seek protection in merger proceedings.

For example, the Board's Press Release of October 3 clearly infers that the gateway, build-out and bottleneck issues are the "minimum" components of a required "competitive enhancement" presentation in each merger, while the proposed rules themselves may be read as putting these three elements in a different category. Proposed § 1180.1(c)(2) states: "Applicants shall propose remedies to mitigate and offset competitive harms. Applicants shall also explain how they would at a minimum preserve competitive options such as those involving the use of major existing gateways, build-outs or build-ins, and the opportunity to enter into contracts or one segment of a movement as a means of gaining the right separately to pursue rate relief for the

remainder of the movement" (emphasis added). That language does not posture the three "minimum" elements as part of a competitive enhancement package, but, instead, as part of an effort to preserve existing competitive options.

Moreover, it is not clear how the three "minimum" elements would function, or why the Board left that determination to the applicant railroads ("Applicants shall also explain...."). It is one thing to express a preference for private sector solutions, as does the NPR; it is another to invest carriers that have expressed active hostility to most forms of gateway, build-out and bottleneck relief with the initial power to address these issues, free of guidance from Board rule. If railroads regarded these issues from the same perspective as shippers, they would not be issues. There is a genuine dispute between railroads and shippers regarding the effectuation of gateway, bottleneck, and build-out relief, and it is far from "competitive enhancement" to place the resolution of these issues in the railroads' hands initially. A better approach would be a more firm series of explanatory guidelines.

1. Gateways

The Board's proposal is that "major existing gateways" be kept open in future mergers. There is, however, no definition of what would be considered a "major gateway." Can it be considered "major" for some types of traffic, but not others; is it "major" in comparison to other gateways on the merged system, or in comparison to gateways of the pre-merged carriers; or is there some minimum number of carloads which defines a "major" gateway?

NGFA hopes that the Board will eschew an arbitrary test of "major." If the purpose of "an open gateway" condition is to protect shipper access to markets reached by a competitive rail carrier, then the test of a "major" gateway should be whether it materially affects access to other rail service.

Many parties submitting comments in response to the ANPR, including NGFA, suggested that there not only be a requirement for "open gateways," but that the Board direct that gateways be kept open both physically and economically, reflecting the obvious fact that merely having an open switch does not keep traffic moving over the gateway; rate and service access also is required. Without explanation, the Board has ignored all requests that gateway conditions include economic access.

NGFA reiterates the position it took in its ANPR comments. Rail mergers have exacted a steep anticompetitive price by foreclosing market access; merged railroad systems all too often create rate structures which exclude off-line products or retain on-line products to system destinations, regardless of the marketing preferences of the sellers or buyers of the products. If the Board indeed intends to require enhanced competition as an element of any future merger, then genuinely open gateways must be a part of that package.

The Board can and should utilize its broad merger conditioning authority, under Section 11324, to establish certain minimum elements of economically open gateways. NGFA reiterates its ANPR proposal that the merged carrier not be permitted to raise its

rates over the "open" gateway to any greater extent than the carrier has raised its actual system-wide rates for the same commodities moving in the same quantities to or from the same markets. Without such a requirement, there is a lack of assurance that shippers will not be in a worse position after a merger than before.

2. Bottlenecks

Bottleneck situations similarly present an enigma under the proposed rules. Essentially, the applicants are requested, by proposed § 1180.1(c)(2), to explain how they would "preserve ... the opportunity to enter into contracts for one segment of a movement"; no other form of bottleneck relief is contemplated. The NPR does not explain how the Board would enforce this requirement. Does the Board mean that a merging carrier must offer contracts to its shippers; if so, at what rates?

In any situation where a merger eliminates an opportunity that would have existed, geographically, for bottleneck relief under the Board's contract approach, NGFA believes that the better approach is for the Board to simply require in its merger rules that a rate be quoted to or from an interchange point. A quoted rate can then be challenged, if need be, under statutory provisions. It is difficult to see how a shipper can challenge the offer of a contract rate.

3. Switching

Reciprocal switching is another means of preserving or enhancing competition, but one that is not addressed in the

proposed rules. The Board takes the position that changes in its approach to reciprocal switching should be directed by Congress. NGFA respectfully disagrees, and believes that the Board, either under its broad merger-conditioning authority or as a matter of interpreting Section 11102, can facilitate reciprocal switching and should do so to enhance competition in merger settings.

In any event, however, if the Board disagrees, then NGFA urges the Board to identify specifically those changes to the statute which the Board regards as necessary in order to bring about enhanced competition through reciprocal switching, at least in merger proceedings.

4. Downstream Effects

Proposed § 1180.1(i) states that "the Board cannot evaluate the merits of a major transaction in isolation" and "must also consider the cumulative impacts and crossover effects likely to occur as rival carriers react to the proposed combination. The Board expects applicants to anticipate with as much certainty as possible what additional Class I merger applications are likely to be filed in response to their own application and explain how these applications, taken together, could affect the eventual structure of the industry and the public interest."

NGFA compliments the Board for its effort to examine the limited possibilities for other Class I mergers as matters related to a pending merger. It is not clear, however, how such an examination will be implemented. For example, if the applicants state that they foresee no downstream or crossover effects

following their proposed combination, and none are placed before the Board prior to the submission of evidence regarding the pending consolidation, what does the Board expect of the parties to that proceeding?

The consideration of downstream effects makes the most sense if it is assumed that a second merger will follow on the heels of the first and that both will be before the Board in a relatively concurrent posture. However, that may not occur.

The Board can and should compensate for any deficiencies resulting from a time lag between an initial merger application and a downstream merger application by stating that the Board will utilize its Section 11324 conditioning authority to reserve jurisdiction in all mergers for the imposition of revised merger conditions reflecting the needs of the public interest that may develop as a result of subsequent mergers. Proposed § 1180.1(i) should be so amended.

5. <u>Service Disruptions</u>

Many shippers, shipper organizations (including NGFA), and short line interests urged the Board to include in its proposed rules provisions making merged carriers strictly and fully accountable for damages attributable to post-merger service failures. The proposed rules fail to do so.

In lieu of specific accountability provisions, proposed § 1180.1(h) calls on the merger applicants "to establish problem resolution teams and specific procedures for problem resolution," including "related claims issues." The Board itself proposes to

conduct post-approval operational monitoring and to establish a "Service Council made up of shippers, railroads, and other interested parties to provide an ongoing forum for the discussion of implementation issues."

Although a Board monitoring system and a Service Council are positive proposals, they do not supplant the need for a more disciplined approach to post-merger service failures. Service failures, following the last several Class I rail mergers, have no doubt cost shippers millions of dollars. Mere STB monitoring of service failures, or requiring periodic report filing with the Board, will do little or nothing to deter additional service failures or to make shippers whole for post-merger damages.

In many respects, the issue of damage compensation for post-merger service failures speaks to the question of who must pay for the railroads' mergers: their stockholders or their customers. The Board recently ruled -- regrettably so in the opinion of NGFA -- that railroads may include, in their cost base for rate purposes, not only the above-market premiums paid for other railroads, but also the expenses attributable to post-merger service difficulties. Shippers should not have to pay twice for the same service failure costs. If the merged carriers can recover those costs through rates, they should not also be able to recover them by denying compensation to their customers.

NGFA recognizes that it may be difficult for the Board to prescribe exact rules that contemplate and compensate adequately and fairly for each discreet form of merger-related damage that may

be suffered by shippers as a result of post-merger service failures. Nevertheless, the Board should take steps that provide a persuasive incentive for carriers to avoid repetitions of the service problems that followed the Burlington Northern-Santa Fe, Union Pacific-Southern Pacific, and Conrail acquisition transactions. NGFA accordingly makes the following proposals.

A. The rules should compel railroads to respond to service failure damage claims within 120 days of receipt of the claim (or some other time period that the Board may prefer). In some prior post-merger situations, railroads stonewalled claims. Subjecting claim disposition to time limits would be to treat such claims like claims for loss and damage falling under Section 11706, the Carmack Amendment. Even though the Board does not itself adjudicate Carmack claims, it maintains regulations which govern the processing of such claims. See 49 C.F.R. § 1005, Principles and Practices for the Investigation and Voluntary Disposition of Loss and Damage Claims and Processing Salvage.

B. Carriers should be required to apply a market compensation standard in evaluating the payment of damages for service failures. The Board's rules should state that it is unreasonable and unacceptable for railroads to arbitrarily reject claims, as most railroads have done to some extent following the last several Class I mergers. To illustrate, where merger related slow-

downs halve a shipper's use of private freight cars or shut down production facilities, carriers generally state that they do not entertain such claims and take such positions without any factual examination of whether the claims may be related foreseeably to carrier service failures. The Board's rules should require carriers to set forth substantive reasons for refusing claims and not permit arbitrary rejections.[3]

C. The Board should use its merger-conditioning authority to require applicants to subject themselves to arbitration for the resolution of service failure claims that are not settled voluntarily.

NGFA undertakes to provide arbitration services for certain disputes between rail shippers and railroads pursuant to a defined Rail Arbitration Agreement. Parties, railroad and shipper alike, electing to participate in that process are compelled to arbitrate the enumerated disputes. NGFA has found such arbitration to be extremely effective. NGFA members report that, with arbitration in place, a great many disputes regarding specifically arbitrable issues such as loss and damage claims, matters arising under rail transportation contracts, and the mishandling of private equipment have

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[3] In Liability for Contaminated Covered Hopper Cars, 10 I.C.C. 2d 154, 166 (1994), the I.C.C. noted that a very broad range of consequences are compensable under the Carmack Amendment, where the statutory standard for liability is "actual loss."

been resolved voluntarily, in most cases without an arbitration even being commenced, because of the availability of arbitration as a manner of alternative dispute resolution.

The Board should provide that parties have the right to agree on an arbitration forum or use arbitration under STB procedures as a fall-back system.

6. Transnational Issues

The purpose of proposed § 1180.1(k) is to require the applicants to assess, in transnational merger proceedings, the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations and be detrimental to the interests of the United States rail network.

These transnational standards appear to omit any requirement that the applicants to a transnational transaction address cross-border car distribution, marketing, and route rationalization issues, a proposal which NGFA reiterates from its ANPR comments. NGFA does not believe that it suffices to require the applicants to present evidence only as to the United States rail network. A trans-national transaction that permits a foreign entity to control a railroad operating in the U.S. should be examined to determine whether the transaction will prejudice the interest of U.S. shippers.

7. Private Agreements

In proposed § 1180.1(e), the Board states its policy of respecting "the sanctity of collective bargaining agreements" and states that "it will look with extreme disfavor on overrides of collective bargaining agreements."

The Board's power to override collective bargaining agreements flows from Section 11321(a). That same provision entitles the Board to set aside not only collective bargaining agreements, but privately negotiated contracts between merging carriers and their customers. In the Conrail acquisition transaction, the Board in fact utilized that authority to temporarily set aside certain provisions in contracts between Conrail and its customers.

NGFA believes that the Board's rules should express the same respect for the "sanctity" of privately negotiated contracts as it does for collective bargaining agreements. Proposed § 1180.1(e) may not be the correct place for the expression of those views, but they should be included at some point in the Board's final rules.

III. CONCLUSION

Promulgation of new merger guidelines is among the most important actions that the Board can take in carrying out its statutory mandate. Failure to issue meaningful, clearly articulated and readily enforceable standards will invite further injury to rail customers by encouraging carriers to embark upon potentially disruptive transactions on the basis of unrealistic assessments of public benefits. Only if carriers know with a high degree of certainty that they will be held accountable and required

to make innocent rail users whole will they exercise appropriate care in structuring and implementing future merger transactions. The Board should take full advantage of this unique opportunity to promulgate effective new rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on all parties of record by first class mail, postage prepaid, this 17th day of November, 2000.

Andrew P. Goldstein

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